APPEAL NO. 992397

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on October 1, 1999. The issues at the CCH were whether good cause exists to relieve the respondent (claimant) from the effects of the agreement signed on May 11, 1998, whether the claimant has reached maximum medical improvement (MMI), what is the claimant's impairment rating (IR), and whether the claimant had disability from April 19, 1998, to the present. The hearing officer determined that good cause exists to relieve the claimant from the effects of the benefit review conference (BRC) agreement signed on May 11, 1998; that since the BRC agreement is set aside, and there is newly discovered evidence of a previously undiagnosed disc herniation, the claimant has no determinable MMI date and IR as of the date of the CCH; and that from April 19, 1998, to the date of the CCH, the claimant has had disability. The appellant (carrier) appeals, urging that the claimant failed to meet her burden to establish a good cause basis to relieve her of the binding effects of the agreement, and the decision of the hearing officer should be reversed. The claimant replies that the evidence is sufficient to prove that good cause exists to set aside the BRC agreement and the hearing officer's decision should be affirmed.

DECISION

Affirmed in part, reversed and rendered in part.

The parties stipulated that on _____, the claimant sustained a compensable injury to her back; that on May 11, 1998, all parties entered into a BRC agreement regarding the issues of disability, date of MMI and IR; and that at the time of the BRC agreement, the claimant's attorney and claimant were of sound mind. The claimant sustained a low back injury on _____, when she lifted a bag of potatoes. In December 1997, the claimant received treatment from Dr. D, a chiropractor, and was referred to Dr. M for pain management. Dr. M diagnosed the claimant with left lumbar spine radiculopathy, lumbar facet syndrome, lumbar spine sprain, and left sacroiliac sprain. In February 1998, Dr. M prescribed medication, and recommended an MRI and epidural steroid injections. On February 25, 1998, a lumbar MRI was performed by Dr. G. Dr. G's impression was: L5-S1 a small spur not impinging any nerve roots, L4-5 a 3 mm posterior annular bulge not impinging any neural structures, L3-4 a right sided 4 mm posterior lateral disc herniation partially extending to the neuroforamen, but not impinging the nerve roots, and recommend CT scan. After the MRI, Dr. M continued to prescribe medication and recommend epidural steroid injections.

The claimant testified that in February 1998 her medical benefits were being paid, but she was not receiving any temporary income benefits (TIBS), so she obtained an attorney, Mr. F. After receiving a request from the carrier to be examined by a doctor of its choice, Dr. A, Mr. F requested a BRC to resolve the denial of benefits. On April 18, 1998, the claimant was examined by Dr. A who diagnosed "probable degenerative lumbar disc disease with low back pain," and certified that the claimant reached MMI on April 18, 1998,

with a 0% IR. On May 5, 1998, the claimant received notice from the Texas Workers' Compensation Commission (Commission) that a BRC was set for May 11, 1998. On May 6, 1998, the claimant received a copy of Dr. A's certification and on that same day, Mr. F filed a Notice of Maximum Medical Improvement/Impairment Rating dispute (TWCC-32) with the Commission. At the BRC on May 11, 1998, the parties reached an agreement that the claimant had disability from December 5, 1997, through April 18, 1998; that the claimant's date of MMI is April 18, 1998, per Dr. A; and that the claimant's IR is 0% per Dr. A. The claimant testified that when she signed the agreement she had no money, and as a result of the agreement, she received $4,901.00.

The Commission scheduled a designated doctor examination with Dr. S, a chiropractor, despite the BRC agreement. The claimant attended the examination on June 3, 1998, and was diagnosed with lumbar intervertebral disc syndrome with myelopathy, lumbar radiculopathy, and cervical and lumbar myofascitis. Dr. S recommended a needle EMG and a neurosurgical consult, indicated that despite the MRI scan there may be irritation of the lumbar nerve root at L3-4, and stated that the claimant has a very serious lumbar disc problem. Dr. S concluded that the claimant was not at MMI because she continued to receive some benefit from therapeutic care and because of invasive treatment alternatives.

The claimant testified that as a result of Dr. S's recommendation, Dr. D referred her to Dr. G for a lumbar myelogram and post myelogram CT on June 24, 1998. Dr. G states that "at L5-S1 there is a 5+ mm posterior central acute disc herniation that obliterates the thecal fat and indents the ventral aspect of the thecal sac. No doubt, this is an acute or subacute herniation. The patient could benefit from ESI therapy. Clinical correlation is advised." Mr. F asserted that he did not receive Dr. G's reports indicating a herniation at L5-S1 until September 30, 1998, and after he received them, he requested a BRC. Dr. D also referred the claimant to Dr. W who examined the claimant on July 21, 1999. Dr. W recommended lumbar epidural injections, and stated that if there was no improvement after modification of therapy, the option of surgical treatment could be explored. In December 1998, Dr. D referred the claimant to a chiropractor, Dr. H, who certified that the claimant reached MMI on December 22, 1998, with a 9% IR, and stated that if the claimant required surgical intervention in the future, the IR would be adjusted.

The claimant testified that at the time she signed the BRC agreement, she did not know the seriousness of her injury, and did not have all of the facts. The claimant asserts that the myelogram and post myelogram CT indicating a 5mm herniated disc at L5-S1 amounts to newly discovered evidence and the agreement should be set aside. It is the claimant's position that she is not at MMI. The claimant testified that her doctors have continuously kept her off work after the BRC agreement, and her pain is unrelenting. According to the claimant, she did not read the BRC agreement at the BRC, did not ask any questions about what she was signing, did not ask for additional time to read the agreement, and did not tell anybody she could not read the agreement because she did not have her glasses.

Section 410.029 provides that a dispute may be resolved by agreement at a BRC. If so, the agreement resolving the dispute must be reduced to writing and signed by the benefit review officer and each party or the representative of the party. Section 410.030 further states that such a written agreement is binding on the claimant, if represented by an attorney, absent a finding of fraud, newly discovered evidence or other good and sufficient cause to relieve the party of the effect of the agreement. *See also* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 147.4 (Rule 147.4). Whether a good and sufficient cause exists is to be determined from the facts as they stand at the time the party seeks to set aside the agreement. Texas Workers' Compensation Commission Appeal No. 950625, decided June 5, 1995. We have also held that a finding regarding the existence of good cause is reviewed by the Appeals Panel under an abuse of discretion standard, that is, whether the hearing officer looked to appropriate guiding principles. Texas Workers' Compensation Commission Appeal No. 951812, decided December 4, 1995. In determining whether there was an abuse of discretion, the Appeals Panel must consider whether the hearing officer looked to appropriate guiding principles or standards in making the determination. Morrow v. H.E.B. Inc., 714 S.W.2d 297 (Tex. 1986);Texas Workers' Compensation Commission Appeal No. 94244, decided April 15, 1994.

The hearing officer made the following Findings of Fact:

FINDINGS OF FACT

2. On 06-24-98, a myelogram revealed a previously undiagnosed 5+mm disc herniation at L5-S1.

3. Claimant, though no fault of her own, did not have an accurate diagnosis of her condition at the time she signed the BRC agreement, and there is good cause to set aside the BRC agreement of 05-11-98, 1998.

From the hearing officer's findings, it appears that she is relying upon newly discovered evidence as a basis for setting aside the BRC agreement. The phrase "newly discovered evidence" is not defined under the 1989 Act. In Texas Workers' Compensation Commission Appeal No. 941109, decided September 28, 1994, a case involving a similar issue, the Appeals Panel cited case law in determining what constitutes newly discovered evidence. In Merrifield v. Seyferth, 408 S.W.2d 558 (Tex. Civ. App.-Dallas 1966, no writ), the court looked at "newly discovered evidence" as a basis for a new trial and stated that the appellant needed to show that the evidence was unknown prior to trial, that the failure to discover it was not due to lack of diligence, that the evidence was so material it would probably change the outcome, and that it was not cumulative, corroborative, collateral, or impeaching. *Also see* Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ).

There is no indication that the hearing officer considered whether due diligence was shown in determining that the myelogram of June 24, 1998, constituted newly discovered evidence. Prior to the BRC, the claimant was aware of Dr. A's certification and had

disputed it. By signing the agreement, the claimant compromised her potential for any future income benefits and received $4,901.00 in TIBS, with the knowledge that the designated doctor might render an opinion different from Dr. A. The claimant testified that when she signed the agreement, she knew that she had constant ongoing pain in her back and problems with tingling and numbness in her legs, and that the pain she had on May 12, 1998, was the same pain that she had on May 10, 1998. While it is unfortunate that the claimant did not have the myelogram results at the time she signed the BRC agreement, no evidence was presented to establish why this testing was not available at an earlier date. In hindsight, the claimant reached an agreement which gave her less in income benefits than she could have received had she not signed the agreement. However, the fact that the claimant had not received a diagnosis of a herniated disc at L5-S1 at the time she signed the agreement is not, by itself, enough to constitute newly discovered evidence or other good and sufficient cause to relieve the claimant from the effects of the agreement. Applying the above cited standard we determine that the hearing officer, in this case, did abuse her discretion in determining that there is good cause to set aside the BRC agreement of May 11, 1998. We reverse and render a decision that the BRC agreement signed by the claimant on May 11, 1998, was final and binding and that there is no good cause for relieving the claimant of the effects of the agreement. Consequently, we reverse and render a decision that the claimant reached MMI on April 18, 1998 with a 0% IR.

The carrier appeals the hearing officer's determination that the claimant had disability. The claimant testified that as a result of her back injury, she was unable to work from April 19, 1998, through the date of the CCH and this is supported by the medical records of Dr. D. Whether disability exists is a question of fact for the hearing officer to decide and can be established by the testimony of the claimant if found credible. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. MMI does not end disability, rather TIBS payments cease once MMI is reached. *See* Texas Workers' Compensation Commission Appeal No. 91060, decided December 12, 1991. We find the evidence sufficient to support the hearing officer's determination that the claimant had disability from April 19, 1998, through the date of the CCH; however, the claimant is not entitled to any TIBS after reaching MMI on April 18, 1998.

We reverse the determination of the hearing officer that good cause exists to relieve the claimant from the effects of the BRC agreement signed on May 11, 1998, and render a decision that the claimant reached MMI on April 18, 1998, with a 0% IR. We affirm the hearing officer's decision that the claimant had disability from April 19, 1998, through the date of the CCH.

_____
Dorian E. Ramirez
Appeals Judge

CONCUR:

_____
Alan C. Ernst
Appeals Judge

_____
Elaine M. Chaney
Appeals Judge